UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC	
and	
CHERYL MULDREW, an Individual	Case 15-CA-169007
and	
LORRAINE MARKS BRIGGS, an Individual	Case 15-CA-170425
and	
BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN MILLERS UNION	Case 15-CA-174022

RESPONDENT SOUTHERN BAKERIES' BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

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Table of Contents

Table of Authorities

Cases

Other Authorities

STATEMENT OF THE CASE

This case is about a commercial bakery's efforts to enforce its work rules to protect its employees against physical intimidation in the workplace and to protect the general public against contamination of its product. In late 2015, the Respondent, Southern Bakeries, LLC ("Southern Bakeries" or the "Company"), provided a last chance agreement to Lorraine Marks-Briggs ("Briggs") after she was caught contaminating food product by eating off the line, in direct violation of the Company's rules, food safety standards, and a recent mandate from her supervisor. A few months later, after a workplace incident of intimidation, Southern Bakeries met with employees to remind them of its work rules against harassment and intimidation. Briggs ignored this order as well. Just two weeks later, she sought to antagonize a coworker by entering that employees' workstation and intentionally bumping into her. Southern Bakeries lawfully terminated Briggs' employment for her misconduct.

The Decision of Administrative Law Judge Arthur Amchan issued on May 11, 2017 ("the Decision") acknowledges that Briggs broke the rules, but, inexplicably, excuses her for doing so. The ALJ's decision is illogical, relies upon sheer speculation, and otherwise ignores evidence corroborating the legitimacy of the Company's decisions. The ALJ also viewed other evidence in a contorted fashion to find that the Company committed unfair labor practices in its communications with another employee, Cheryl Muldrew ("Muldrew"), and in promulgating certain of its work rules. The Decision is built on error. Misanalysis can be found from the ALJ's second-guessing of the Company's handling of workplace rule violations, to his

failure to consider all the evidence, to his erroneous analysis of certain of the Company's work rules.

First, the ALJ concluded that Briggs' termination was unlawfully linked to discipline from May 2013 that this Board previously ordered expunged. The evidence fails to support this conclusion. It is undisputed that, in October 2015, Briggs violated the workplace rule against eating on the line—ignoring a recent ultimatum from her new manager, Tony Hagood ("Hagood"). It is also undisputed that, in February 2016, Hagood and Human Resources Manager Eric McNiel ("McNiel") reasonably concluded that Briggs left her work area without permission to harass and intimidate a coworker—again ignoring an instructive against such misconduct. Briggs was terminated for her admitted violations of these rules, and the decision would have been the same regardless of the May 2013 discipline. The Board should reject the ALJ's effort to excuse Briggs' misconduct by inserting a stale and immaterial event into the mix.

Second, the ALJ concluded that the Company enacted an unlawful rule concerning confidentiality when it investigated misconduct by Muldrew. That conclusion is unfounded. In fact, McNiel told Muldrew and other employees that statements made to him would be kept confidential *by human resources*. A fair review of all the evidence fails to show that McNiel or anyone else prohibited Muldrew from discussing her discipline or told her that she was being terminated for doing so. The Board's own position confirms this fact: It previously determined that Muldrew's termination was not unlawful.

Third, the ALJ concluded that two of the Company's workplace rules were unlawful. However, those rules have been in place for more than a decade, as they were enacted pursuant to a management rights provision agreed to in a collective bargaining agreement with the Bakery, Confectionary, Tobacco Workers, and Grain Millers Union (the "Union"). The Union never challenged those rules during the entire time it represented the employees. There is absolutely no evidence that the rules were promulgated in response to Union activity or that the rules have ever been used to prohibit protected activity. They would not reasonably be construed by employees as curtailing their Section 7 rights.

In sum, the ALJ erred in finding that certain of the unfair labor practices had merit. Accordingly, Southern Bakeries respectfully excepts to the ALJ's conclusions identified herein and requests that this Board decline to adopt them.

I. Factual Background

A. Company Background and Work Rules

Southern Bakeries is a bakery in Hope, Arkansas. It employs approximately 400 employees. (Decision, 2; Tr.312:15-16.) In 2005, the Company acquired certain assets from Meyer's Bakery, and offered employment to a substantial percentage of Meyer's employees. (Tr.297:11-22.) At that time, the Company negotiated a collective bargaining agreement ("CBA") with the Union. (Tr.297:19-22.) Southern Bakeries withdrew recognition from the Union in July 2013 after a majority of its employees in the bargaining unit submitted a withdrawal petition. (*See* Tr.9:16-17.)

The Company has an Employee Handbook that is distributed to all employees and contains Facility Rules and Disciplinary Procedures. (JX 2; Tr.282:4-8.)[1] The workplace rules, which apply to all employees, were enacted in 2005 pursuant to the management rights provision in the CBA. (Tr.282:9-24.) Since that time, the Company and the Union negotiated several CBAs; the Union never challenged any of the work rules at issue here over the course of those negotiations or through any grievances. (Tr.282:21-283:3, 297:23-298:7.) The work rules were not generated in response to any protected behavior, and they apply to all employees who work for Southern Bakeries, not just those who were formerly in the bargaining unit.[2] (Tr. 293:13-15.)

The Facility Rules consist of three groups of disciplinary violations: Groups A, B and C. Group A Rule infractions are the most serious, are immediate discharge offenses, and are not on a progressive discipline system. (JX 2 at pp.17-18.) One of the Group A Rules, Rule 3, prohibits leaving the employee's assigned job or work area without permission. (*Id.*) Group A, Rule 22, also prohibits leaving an assigned work area without permission. (*Id.*) Group A, Rule 5, proscribes workplace violence and harassment, including, provoking a fight or intimidation. (*Id.*) Another Group A Rule, Rule 6, prohibits insubordination, including disobeying instructions. (*Id.*)

Group B Work Rules generally follow a three-step progressive disciplinary process; however, Southern Bakeries reserves the right to escalate the disciplinary

[1] Respondent will use the following citation form for record exhibits: Joint Exhibit ("JX"); General Counsel Exhibit ("GCX"), and Employer Exhibit ("EX").

[2] The two rules found unlawful by the ALJ are discussed in the Argument portion of this brief, Part II.C *infra*.

process (including proceeding directly to discharge) depending on the severity and/or frequency of the offense. (*Id.* at pp.18-19.) Group B, Rule 3, prohibits "Eating or drinking (with the exception of company provided liquids) outside of production or distribution facility break areas." (*Id.*) Group B, Rule 13, provides that failure to observe facility safety or good manufacturing rules is a disciplinary offense. (*Id.*) One of the Bakery's Good Manufacturing Processes (GMPs) prohibits employees from eating on the production floor. (*Id.* at p.15.)

The purpose of this and the other GMPs is to ensure consumer safety and compliance with regulatory safe quality food requirements. Southern Bakeries is subject to a specific set of industry standards focusing on food safety. (Tr.283:4-11.) The Company is certified by the SQF Institute, which provides a code of specific good manufacturing processes. (Tr.283:23-285:14, 286:6-15; EXs 13, 14.) If the Company fails to comply with those standards, it risks the suspension or loss of its certification, which would prevent it from selling its products. (Tr.285:16-22.) A breach of those standards also places the general public at risk of contamination and foodborne illness. *See* Center for Disease Control and Prevention, "Foodborne Germs and Illnesses," https://www.cdc.gov/foodsafety/foodborne-germs.html (last visited July 18, 2017) (noting that "[e]ach year, 1 in 6 Americans gets sick by consuming contaminated foods or beverages").

Among other things, the SQF Code requires that certified food manufacturers implement and enforce rules to protect the food product against contamination. For example, "[s]moking, chewing, eating, drinking or spitting is not permitted in any food processing or food handling areas," (EX 14 at p.153 (Section 11.3.1.3)), and

"[s]taff shall not eat or taste any product being processed in the food handling/contact zone." (EX 14 at pp.154-155 (Section 11.4.1.1(vi))).

B. Facts Pertaining to Briggs Charges

1. Briggs' Last Chance Agreement

Briggs was a bread packer on the Bread Line. (Decision, 3.) In late 2015 and early 2016, Briggs reported to Bob Buckley, who, in turn, reported to Hagood, Bread Line Manager. (Tr.113:1-8.) Hagood has worked in food manufacturing for nearly three decades. (Tr.469:8-10.) However, Hagood was new to the plant, as he was hired on September 28, 2015. (Tr.468:16-17, 149:11-14.)

Briggs previously signed an acknowledgement of the employee handbook and knew there were rules against eating on the production floor. (Tr.149:22-150:23, JXs 2, 3.) After starting at the bakery in late September 2015, Hagood observed his employees "grazing" (i.e., eating Company product) on the line in violation of the GMPs. (Tr.471:3-15.) He reminded employees that this conduct was not permitted. (*Id.*) Shortly thereafter, he had a meeting with the employees to discuss this type of misconduct and to "draw[a line] in the sand," warning that "[w]e're not going to put up with it any longer. There will be disciplinary action if this continues." (Tr.471:10-15.) Briggs was present for Hagood's ultimatum. (Tr. 149:15-18, 471:16-22.)

Unfortunately, Briggs did not comply. (Tr.149:19-25.) On October 8, 2015, Hagood observed Briggs picking topping off of the apple swirl bread line and eating it on the production floor in violation of Group B, Rules 3 and 13. (Decision, 3.) Hagood described the incident:

> [I] was standing across a conveyor. She had her back to me. I was standing just observing the whole department. Looked around, she reached over to a loaf of bread that was coming down that had a topping, a strudel topping on top of the bread. She reached over and picked some strudel off and put it in her mouth.

(Tr.472:1-7.)

After admonishing Briggs, Hagood sent a disciplinary action form to human resources. (Decision, 3; Tr.472:20-473:5, 118:3-13.) McNiel, who was also a new employee -- having begun working as the Human Resource Manager just a few days after the incident, on October 12, 2015 -- received the write-up form. (Tr.309:7-8, 333:13-20.) McNiel oversees employee discipline. (Tr.311:2-9.) He has decision-making authority relative to written warnings, last chance agreements, and terminations. (Tr.311:13-312:1.) In making termination decisions, McNiel will seek approval from Rickey Ledbetter ("Ledbetter"), Southern Bakeries' General Manager and Executive Vice President, but ultimately McNiel has final decision-making authority. (Tr.312:2-9.)

McNiel addressed Briggs' violation of the work rules as one of his first action items at the Company, and he opened an investigation. (Tr.333:13-20.) McNiel met with Briggs twice, and spoke with Hagood and Doris L. Ingram, the line lead in the bread department. (Tr.334:6-16, 336:17-337:11; EXs 4, 5.) Briggs did not dispute that she had eaten off the line, but claimed it "was not a big deal because apparently, she said people do it all the time." (Tr.335:19-24.) McNiel sought to follow up on this claim, but described how his efforts were stymied by Briggs:

> I had only been there a few days, but I had, you know, had to review policies and stuff so I knew it was against policies from day one. So I

> was, you know, a little surprised that she said, everyone does it all the time. So I asked her, well, who is everyone? And that's all she would tell me was everyone. She would never give me specific names because with that, I would investigate it further as to, you know, who's eating on the line and who's allowing it to happen.

(Tr.335:24-336:7.) Briggs confirmed that she refused to provide specific names to McNiel. (Tr.120:14-19, 152:5-23.)

McNiel viewed Briggs' conduct as being "a very big problem" because, by taking a piece of bread and putting it in her mouth "it has the potential to contaminate her fingers by whatever's in her mouth and then going back to work on whatever's on the line." (Tr.340:21-24.) Moreover, Briggs' admission that she did so "every time they run that . . . product" presented a serious issue because she was "contaminating her product and it's going to our customers." (Tr.340:16-341:5.) Indeed, she was eating off the line right before the product was packaged (not before the baking process, which might have mitigated the unsanitary consequences of her actions). (Tr.472:11-12.)

Upon completing his investigation, McNiel met with Ledbetter to discuss next steps. Ledbetter recalled that Briggs had a previous final written warning, but McNiel, who had just begun working at the plant, could not find that written documentation. (Decision 3; Tr.339:2-11.) Thus, rather than terminating her employment, Southern Bakeries placed Briggs under a Last Chance Agreement ("LCA") for her violations of Group B, Rule 3 and 13. (Tr.339:20-340:1.)

An LCA allows an employee to remain employed on the express written understanding that any future violation of a Group A Rule or a serious violation of a Group B Rule may result in immediate termination of employment. (GCX 5 at 2.)

The LCA also provides that employees may seek internal review of the disciplinary action by filing a written complaint (or appeal) within five days with the Acting Director of Manufacturing. (*Id.*) Briggs signed the LCA provided by Hagood and McNiel, and did not appeal their decision. (Tr.342:16-19, 160:3-9, GCX 5 at 2.)

At the time the LCA was administered to Briggs, neither Hagood nor McNiel had any knowledge that she had engaged in any previous union activity or filed any charges with the Board. (Tr.339:12-19, 473:18-24.) The Company withdrew recognition from the Union in July 2013 based on an employee withdrawal petition signed by a majority of its employees – more than two years prior to Hagood and McNiel's starting work at the Company. (Tr.9:16-17.) As such, neither Hagood nor McNiel had any involvement in earlier proceedings before the Board relating to that event or Briggs' previous charge against the Company.

2. Briggs' termination

On January 22, 2016, in response to a disruption in the bread department caused by Muldrew (*see* Part I.C *infra*), Hagood and McNiel held individual meetings with employees, including Briggs. At those meetings, they reviewed the Company's work rules and policy prohibiting hostile workplace conduct to deter harassing and violent conduct. (Decision, 4; Tr.343:22-345:5; 161:2-8.) Each employee was issued another copy of the Facility Rules and Disciplinary Procedures and the Company's policy against harassment. (Tr.344:17-22, 161:9-19; EX 7.) The employees were encouraged to read and retain these rules and policy to reinforce their personal responsibility for appropriate workplace conduct. (EX 7.)

Management made very clear in the meetings that engaging in any conduct prohibited by these rules and policy was a serious offense, that failing to comply with the Company's appeal for cooperation would be considered insubordination, and that the consequence would be disciplinary action up to and including immediate suspension and discharge. (EX 7; Tr.345:9-12.) Like the other employees, Briggs signed a confirmation that she had received the Facility Rules and policy against harassment and that management had appealed for her cooperation in complying with them. (Decision, 4; Tr.345:6-8, 161:15-162:14; EX 7.)

Unfortunately, Briggs again failed to comply. Instead, just two weeks later, on February 8, 2016, Hagood received a report that Briggs left her work area without permission and had acted in an intimidating way toward Ashley Hawkins ("Hawkins"), another employee. (Tr.473:25-474:15.) According to Hawkins, Briggs had walked from the bread wrap to the bread scaling area and had deliberately walked between Hawkins and Earl Hopson ("Hopson") and intentionally bumped into Hawkins. (Decision, 4; Tr.250:2-251:15, 474:5-11, 479:23-480:8.) Hawkins reported Briggs to Hagood. (Decision, 4.) In turn, Hagood took Hawkins to human resources, who repeated her account to McNiel. (Decision, 4; Tr.345:13-346:9, 474:12-15.) Following standard protocol, McNiel opened an investigation and suspended Briggs pending his investigation into the alleged incident. (Tr.137:5-17.)

During the investigation, Hawkins told McNiel that she had been talking to Hopson when Briggs had walked between them, bumping into Hawkins. (Tr.345:16-347:9; EX 11, 12.) Hawkins and Hopson both recounted that they had been standing in a wide area and there was ample space for Briggs to go around them. (Tr.346:25-

347:9, 348:8-23.) Another employee, Sandra Phillips ("Phillips"), recalled that Briggs had told her about the incident. (Tr.358:4-13.) According to Phillips, Briggs admitted that Hawkins was in her way, and Briggs had not gone around Hawkins, but instead had brushed shoulders with Hawkins. (*Id.*; Tr.105:5-106:2; GCX 4.) Briggs reportedly made no attempt to apologize or speak to Hawkins when this happened and was seen laughing right afterwards while looking at Hawkins. (Tr.346:2-6.) Hawkins told management she felt "violated, and picked on" by Briggs. (EX 11.)

McNiel also interviewed Briggs. (Tr.154:24-155:3, 346:6-9, 357:8-20; EX 9, 10.) He asked her about leaving her work station without permission, and Briggs claimed that she always goes to the bread scaling area to wash her hands. (EX 10.) This was contradicted by employees who work in that area, including Hopson, a disinterested observer who works the same shift as Briggs and who told McNiel that he had never seen Briggs come over there to wash up. (Tr.348:8-349:6; EX 16, 17.) Likewise, Hagood testified that employees in the production line would normally wash their hands in the breakroom restroom area. (Tr.475:9-12.) Briggs tried to excuse her conduct toward Hawkins by maintaining that Hawkins had been picking on her for about two weeks. (Tr.134:22-135:15.) Yet, Briggs had not previously complained to management about Hawkins treating her inappropriately. (Tr.135:12-15.) So while Briggs' testimony about Hawkins' previous conduct toward her lacked exculpatory power, it did explain why she went out of her way to harass and incite Hawkins.

McNiel concluded his investigation on or about February 17, 2016. (GCX 6.) McNiel reasonably determined that Briggs had violated Group A, Rules 3, 5, 6, and 22 (prohibiting leaving one's work area without permission, harassing or intimidating conduct, and insubordination, respectively) and the Company's policy against workplace harassment and violence. (Tr.360:6-17.) The fact that McNiel and Hagood had recently met with Briggs and her co-workers to reinforce that they must not engage in hostile behavior compounded her offense. (*Id.*; Tr.369:6-13.) Given these facts, McNiel made the decision to terminate Briggs' employment. (Tr.367:16-18.) He conferred with Ledbetter who affirmed his decision. (Tr.369:14-370:3.) Accordingly, Briggs was discharged on February 19, 2016. (Decision, 5; Tr.141:10-142:6; GCX 6.)

Hagood wrote "Do Not Rehire" on Briggs' termination paperwork. He explained that he did so based upon his past practice from his previous employer, and that he believed that the physical nature of Briggs' misconduct warranted such an instructive. (Tr.476:21-477:12.) At the time that he did so, Hagood had no knowledge of any affiliation between Briggs and the Union. (Tr.476:7-12.)

C. Facts Pertaining to Muldrew Charge

Muldrew worked on first shift as a Packer/Break Out person in the Bread Department. (Tr.14:8-16.) On January 14, 2016, McNiel received an employee complaint that Muldrew had behaved in a threatening manner toward a pregnant co-worker. (Tr.316:17-317:13; *see also* EX 1 at B-7.) McNiel opened an investigation and placed Muldrew on suspension pending the results of his inquiry. (Tr.17:13-

18:10.) Muldrew was not given any instruction not to discuss her suspension with her co-workers. (Tr.27:13-16.)

McNiel conducted interviews and took written statements. (Tr.317:8-318:2.) He reasonably concluded that Muldrew had engaged in bullying and harassing conduct in violation of Group A, Rule 5, against workplace violence and harassment. (EX 1 at B-13—B-15.) McNiel also concluded from a separate report that Muldrew violated Group B, Rules 3 and 13, and a GMP by having a mint in her mouth on the production floor. (*Id.*) McNiel decided that she should be offered an LCA instead of being discharged. (*Id.*) Muldrew signed the LCA on January 19, 2016 and made no request for an appeal. (Tr.18:20-20:17, 321:14-19.) The LCA, which McNiel read to Muldrew, did not include any prohibition against Muldrew's sharing confidential information. (Tr.39:7-23, 41:23-42:1.)

The LCA was insufficient to curb Muldrew's threatening conduct. The same day that Muldrew signed her LCA, another employee reported that Muldrew had threatened to retaliate against the person who reporter her. (Tr.322:2-13.) Once again, McNiel placed Muldrew on suspension pending his investigation and took written statements from employees. (Tr.24:19-25:22, 323:21-25; EX 1 at B-16—B-21.) McNiel concluded that Muldrew had again violated Group A, Rule 5, against violent or harassing behavior. (Tr.328:9-13.) Making matters worse, Muldrew had also engaged in insubordination by failing to comply with the prior warning and continuing to threaten her coworkers. (Tr.328:13-23.) McNiel made the decision to terminate her employment effective January 27, 2016. (*Id.*; EX 1 at B-1—B-2.)

D. Procedural History

Muldrew, Briggs, and the Union filed unfair labor practice charges against Southern Bakeries. A hearing was held before Judge Amchan on January 11 and 12, 2017, in Hope, Arkansas. (Decision, 1.) The ALJ issued his Decision on May 11, 2017. In the Decision, the ALJ found against Southern Bakeries with respect to all of the above-noted events as well as two specific work rules. The instant exceptions of Southern Bakeries take issue with those aspects of the ALJ Decision.

II. Legal Argument[3]

The ALJ's conclusion that Southern Bakeries engaged in certain unfair labor practices is unsupported by the evidence and the law. Rather than weighing all the evidence, the ALJ ignored favorable evidence for the Company and filled conspicuous gaps in the General Counsel's case-in-chief with his own conjecture. And rather than applying Board law, the ALJ inserted his own brand of workplace justice.

"[W]hile the 'clear preponderance of the evidence' standard governs Board review of an administrative law judge's *credibility* determinations, that standard does not apply to a judge's factual findings or the judge's derivative inferences or legal conclusions." *Plaza Auto Ctr.*, 360 NLRB 972, 980-81 (2014). Instead, the Board is to "base [its] findings as to the facts upon a *de novo* review of the entire record [.]" *Id.* (quoting *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950)).

[3] Pursuant to Section 102.46(c)(2), each of the questions "involved and to be argued" is stated consecutively in accordance with the specific exceptions to which they relate.

As a result, "the Board is free to draw different derivative inferences and conclusions from the evidence than did the administrative law judge." *Id* (citing *NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980) *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977)).

Each of the ALJ's errors is addressed in turn.

A. Exception 1: The ALJ erred by concluding the Company violated Section 8(a)(1), (3) and (4) by disciplining Lorraine Marks Briggs and marking her ineligible for rehire in an internal document.

The ALJ concluded that the Company violated Section 8(a)(1),(3) and (4) of the Act by (i) issuing a last chance agreement to Briggs on October 16, 2015; (ii) suspending Briggs on February 8, 2016; (iii) discharging Briggs on February 19, 2016; and (iv) marking Briggs ineligible for rehire on March 4, 2016. (Decision at 13.) The ALJ's determination that the Company's actions were unlawful is unsupported by the evidence and inappropriately interferes with the Company's efforts to enforce its reasonable work rules.

1. The Company did not act unlawfully by issuing Briggs a last chance agreement on October 16, 2015.

The analysis regarding the entry of the LCA is straightforward: Briggs was caught contaminating product by eating toppings off the line. (Tr.149:19-25.) Her offense was compounded by her decision to ignore a direct mandate from Hagood against such misconduct. (Tr.471:10-22.) As a result, she was properly issued a LCA for her admitted violation of the work rules. (GCX 5.)

Despite Briggs' confession that she broke the rules, and despite the Company's consistent application of those rules, the ALJ concluded that Briggs'

discipline was unlawful. (Decision, 13.) The ALJ stated that the Company "failed to establish [that] it would have disciplined [Briggs] in the same way in October 2015" absent its reliance on her May 30, 2013 discipline.[4] (Decision, 6.) The ALJ's conclusion is unfounded.

First, the ALJ's analysis is faulted because whether the May 2013 discipline was actually unlawful is still an open question. There has been no final resolution on that issue, as it is currently on appeal before the United States Court of Appeals for the Eighth Circuit. Logically, if the Eighth Circuit agrees that Briggs' discipline in May 2013 was not unlawful, the cornerstone of the ALJ's analysis would be gone. At the very least, the ALJ's decision is premature.

Second, the evidence overwhelmingly shows that the May 2013 discipline had no bearing on Briggs' treatment. The Company had a legitimate reason to place Briggs on a LCA for grazing on the line. Her actions resulted in the contamination of its product; and she admittedly did so "every time they run," confirming that this was not an isolated incident on her part. (Tr.340:16-341:5.) Moreover, Hagood had just drawn a line in the sand about grazing on product; and Briggs was the only person who Hagood saw doing so following his ultimatum. (Tr.153:18-25.) The ALJ inexplicably ignored these facts in his analysis. *Cf. Canandaigua Plastics*, 285 NLRB 278, 280 (1987) ("Here, it is clear that the Respondent warned Bendzus to

[4] Briggs was disciplined in May 2013 in relation to an incident in which she walked off the job without permission. The Board excused Briggs' misconduct, finding that the Company's discipline toward Briggs was motivated by anti-union animus. *See Southern Bakeries, LLC*, 364 NLRB No. 64 (2016). That determination is currently pending before the United States Court of Appeals for the Eighth Circuit. *Southern Bakeries, LLC v. NLRB*, Nos. 16-3328, 16-3509 (8th Cir.).

stop harassing other employees and specifically told her that her attitude must improve. As Bendzus' conduct continued even after she was warned, the Respondent determined that further action was necessary. Therefore, we find no basis for concluding that Bendzus was disparately treated because of her union activity.").

Lacking any evidentiary foundation, the ALJ inserted his own notion of food safety by rejecting McNiel's "assertion that eating product is a more serious violation than eating other food or chewing gum." (Decision, 3 n.2.) To the ALJ, there is no distinction between eating product directly on the line and having other food in the production area. (*Id.*) The ALJ suggested that "it seem[ed] counterintuitive that chewing gum or eating French fries on the production line is less likely to result in product contamination than picking the topping off of apple swirl bread." (*Id.*) Both common sense and testimony on the record refute this comparison.

Briggs had to actually touch the product just before it was packaged in order to commit her repeated offense. There is no doubt about product contamination each time she did this. However, chewing gum or eating French fries in the production area does not necessarily contaminate the product, depending on the facts in each such situation. Moreover, McNiel also rebutted the ALJ's "intuition" by explaining why Briggs' conduct warranted the imposition of the LCA:

> It's a very big problem because one, she's eating so she pinched off a piece of bread, put it in her mouth so it has the potential to contaminate her fingers by whatever's in her mouth and then going back to work on whatever's on the line. So she didn't stop to go wash her hands so that's actually another GMP that she violated. She, you know, just continued to work. And if she does that all the time, as she said that she does every time they run that – that product that she

> eats that, then that's a – that's a huge issue because you're contaminating product and it's going to our customers.

(Tr. 340:21-341:5.)

While Briggs claimed that multiple other employees have eaten food product from the line and that it was not a big deal, she admittedly refused to provide any specific names to allow McNiel to investigate that accusation. (Tr.151:21-152:23, 335:24-336:7.) Her claim that her conduct was not serious was further undermined by the testimony of Gloria Lollis, a former employee who appeared for her testimony under a subpoena from the Board and who had no incentive to lie, who testified that she did "not know of any employees who eat on the production floor. This is against the rules. I do not know of any employee who . . . eat bread crumbs." (Tr.82:6-16.) Phillips corroborated Lollis, testifying that eating on the line was not permitted, and that the rule prohibiting such conduct was a serious one. (Tr.102:17-19.)

Reinforcing that Southern Bakeries treated Briggs in a just and non-discriminatory fashion, the Company placed her on a LCA rather than terminating her when she committed a dischargeable offense in October 2015 and was already on a final written warning. From a logical perspective, if the Company was motivated by Briggs' earlier discipline from May 2013, it would have terminated her employment at that time rather than giving her yet another chance. But logic and the ALJ's conclusion on this matter simply do not intersect.

The seriousness of Briggs' misconduct cannot be overstated, as the risk of product contamination places the safety of the general public at risk. *See* Beth Kowitt, "Why Our Food Keeps Making Us Sick," Fortune.com,

http://fortune.com/food-contamination (last visited July 20, 2017) (noting that 48 million Americans get sick from food-borne pathogens each year, resulting in an estimated cost of $55.5 billion). The Board is not free to second-guess a company's legitimate decision to take appropriate disciplinary action to curb serious misconduct that violates food manufacturing processes and places consumers' health at risk. Yet, that is exactly what the ALJ did. The Company's discipline of Briggs was not unlawful, and the ALJ erred in concluding otherwise.

2. The Company did not act unlawfully by suspending Briggs on February 8, 2016.

The ALJ also concluded that the Company unlawfully suspended Briggs on February 8, 2016, while it investigated Hawkins' complaint against Briggs. (Decision, 13.) The ALJ cited no analysis or evidence to support this conclusion. The evidence, including the Company's treatment of its investigation into misconduct by Muldrew, demonstrated that the Company routinely suspended employees while it investigated similar misconduct. (*See also* GCX 25.) There was absolutely no evidence offered by the General Counsel to show that the Company's conformity with this past practice was in any way motivated by Briggs' discipline in May 2013. Moreover, it is a common human resource practice to suspend employees suspected of serious wrongdoing during an investigation of the matter. It maintains the integrity of the investigation by preventing witness tampering and keeps potentially undesirable workers out of the workplace. If the accused employee is exonerated through the investigation, the employer can retroactively pay the employee for the period of suspension. The ALJ inexplicably and improperly failed

to fairly review the evidence or to accede to generally accepted personnel practices in sustaining this charge. Once again, he impermissibly substituted his judgment for that of management with no reasonable basis for doing so.

3. The Company did not act unlawfully by discharging Briggs on February 19, 2016.

At the crux of his analysis, the ALJ determined that the Company unlawfully terminated Briggs for leaving her work station to intimidate Hawkins. To the ALJ, this determination was also tainted by Briggs' May 2013 discipline. This conclusion was also in error and strains credulity.

The ALJ agreed that the Company was reasonable in concluding that Briggs had "intended to antagonize" Hawkins: "With regard to February 2016 interaction with Ashley Hawkins, Respondent had a reasonable basis for concluding that [Briggs] intended to antagonize Hawkins by using the wash stand in the bread scaling area and walking close to Hawkins." (Decision at 6.) But the ALJ faulted the Company for crediting Hawkins' version of events over Briggs as it pertained to the physical contact: "Respondent has not shown that it had any reasonable basis for believing Hawkins' contention that [Briggs] brushed her, as opposed to [Briggs'] contention that Hawkins initiated physical contact." (Decision, 6 (footnote omitted).)

This conclusion that it was reasonable for McNiel to believe that Briggs intended to antagonize Hawkins but somehow not reasonable to believe that Briggs had initiated physical contact or that such contact was "insignificant" is incongruous at best and unfairly biased at worst. In trying to piece together what happened between Briggs and Hawkins, McNiel faced a she-said, she-said scenario.

The evidence is undisputed that, after undertaking a comprehensive investigation and weighing the evidence, McNiel honestly believed that Hawkins' account was the more credible one.[5] And, contrary to the ALJ's suggestion, McNiel's decision was not unreasonable. Briggs herself explained her motivation for harboring ill will toward Hawkins. (Tr. 134:22-135:15.) Moreover, disinterested observers, including Hagood, Hopson, and Phillips, corroborated large pieces of Hawkins' story:

- Hagood was the first member of management to see Hawkins' response to the incident, and he found it serious enough to immediately take Hawkins to Human Resources to address the situation. (Tr.474:4-15, 480:1-8.) Hagood personally believed that, because of the physical nature of her misconduct, Briggs' misconduct was a serious offense. (Tr.477:7-14.)
- Hopson testified that Briggs walked directly between Hawkins and himself, despite the fact that there was plenty of room to go around them. (Tr.456:8-19, 460:22-461:4.) Hopson did not observe Hawkins make any movements to obstruct Briggs' path. (Tr.461:17-462:6.) Hopson also testified that he believed that, knowing Hawkins, he believed that she handled the situation very well. (Tr.467:22-2+3.)

[5] In a footnote, the ALJ faults McNiel for choosing to credit Hawkins of Briggs, and then suggests that the Company treated an employee named Juan Betancourt more favorably by crediting him when he denied threatening to shoot a coworker. (*See* Decision, 5 n.4.) The ALJ's logic is severely faulted and would lead to absurd results. Applying the ALJ's standard, Southern Bakeries would be barred from deciding between witnesses any time those witnesses give contradicting accounts of a workplace scuffle. That the Company credited Betancourt's denial does not mean that it was required to credit Briggs.

- Phillips testified that, although she denied doing it on purposes, Briggs admitted to her that Briggs "did bump into Ashley." (Tr.105:25-106:2.)

In contrast, Briggs' account of approaching Hawkins from behind, and Hawkins suddenly contorting her body in front of Briggs was comical at best. (*See* Tr. 173:22-176:24.) Given Briggs' contention that Hawkins had been treating her with noticeable disdain prior to the incident, and management's recent plea for workplace peace, Briggs decision to steer so close to Hawkins calls Briggs' asserted innocence into doubt. Indeed, Briggs choosing to wash her hands at the sink near the area she could see Hawkins standing, rather than using her normal wash-up area, screams of an inappropriate intent to mix it up with a co-worker she thought was already upset with her. Rather than taking the bait, however, Hawkins did the right thing by reporting Briggs to management.

The ALJ also completely avoided the context in which Briggs acted – at a time when tensions in her department were at an apex following Muldrew's threatening conduct and discharge. As importantly, the ALJ also avoided that, just days prior to this incident, Hagood and McNiel met with Briggs to reinforce the need to comply with Southern Bakeries' rules and policy forbidding harassment and workplace violence. Briggs had even signed a written intent to comply with those rules and policy and been cautioned that non-compliance would be considered insubordination. Having chosen to completely disregard the Company's rules and these prior warnings, Briggs should reasonably have expected to (and should) bear the consequences.

Although McNiel referenced the May 2013 discipline in Briggs' termination notice, he denied that it had any impact on his final decision. (Tr.368:19-369:13.) Rather, he reasonably concluded that Briggs' LCA in tandem with this act of harassment and insubordination could stand alone in justifying Briggs' discharge. As McNiel explained:

> Because of the severity of the actions that she took. You know, creating a hostile work environment is very serious. And after just having the incident and us saying, you know – meeting with the employees and saying hey, you know, we need to calm it down, this is what's going on, let's stop this, and her signing off on it, we took that in agreeance, that she agreed to what we were asking. So yeah, I felt this would have definitely happened this way.

(*Id.*) McNiel's testimony was not contradicted by any witness, and thus, contrary to the ALJ's conclusion, his denial was not in any way "incredible." (Decision, 5.)

Because there was no evidence that McNiel had any personal knowledge or animus toward the Union, the ALJ sought to imply such an animus by tying McNiel to Rickey Ledbetter, who served as the corporate representative at the February 2014 hearing which pertained, in part, to Briggs' prior ULP charge. In particular, the ALJ discredited McNiel's testimony that Ledbetter merely confirmed his termination decision, concluding instead that "Ledbetter played some role in the termination decision and the extent of that role may not be reflected in the record." (Decision, 6.) However, "the judge's speculation about [McNiel's] knowledge [and Ledbetter's role] does not substitute for the required proof." *Field Family Assocs., LLC*, 348 NLRB 16, 17 (2006). As the ALJ recognized, the Company "called Ledbetter as a witness in the proceeding" and "[n]either party inquired as to his role in the [Briggs] termination." (Decision, 6.) There was no need for the Company to

elicit duplicative testimony on this point. McNiel's testimony stood uncontroverted. To the extent that General Counsel disputed his testimony, it was incumbent upon the General Counsel to probe into that topic with Ledbetter. As well, if the ALJ sought further clarification on the issue, he could have asked Ledbetter about it during the hearing. The ALJ's insertion of his own speculation regarding Ledbetter's role in the decision is not evidence and is wholly and unfairly improper.

In sum, given McNiel's honest and reasonable belief that Briggs sought to antagonize Hawkins and did so using physical force, McNiel was completely justified in making the decision to terminate Briggs. "[E]mployees have a right to a workplace free of unlawful harassment, and both employees and employers have a substantial interest in promoting a workplace that is 'civil and decent.'" *Martin Luther Mem. Home, Inc.*, 343 NLRB 646, 648-49 (2004). Subjecting co-workers to abusive treatment is not what the National Labor Relations Act is intended to protect "and it certainly should not be accepted by an arm of the federal government." *Consolidated Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 24 (D.C. Cir. 2016) (Millett, J., concurring). It simply makes no sense that, as the Decision stands now, McNiel was required by the NLRA to disbelieve Hawkins' account and let Briggs' misconduct go unremedied. The Board should reject the ALJ's attempts to insert his speculation rather than relying on the actual evidence in the record. The ALJ should also not be allowed without legal or factual foundation to substitute his judgment as to the proper measure of discipline attributable to any offense over that of management's after concluding that the Company reached a reasonable conclusion concerning Briggs' intent to antagonize Hawkins.

4. The "ineligible for rehire" notation was not unlawful.

Finally, the ALJ found that the Company acted unlawfully when Hagood wrote "Do Not Rehire" on Briggs' termination paperwork. Hagood explained without contradiction that he did so based upon his past practice from his previous employer, and that he believed that the physical nature of Briggs' misconduct warranted such an instructive. (Tr.476:21-477:12.) McNiel corroborated this account. (Tr.371:24-373:1.) There was absolutely no evidence that Hagood had any animus toward the Union. To the contrary, Hagood had no knowledge of any affiliation between Briggs and the Union at the time he took this action. (Tr.476:7-12.)

Turning a blind eye to Hagood's honest explanation, the ALJ concluded that the "record belies Respondent's suggestion that Hagood's notation was an inadvertent error made without discriminatory intent." (Decision, 7.) The sole "evidence" cited by the ALJ to support this statement is email correspondence between the undersigned counsel and an NLRB Board Agent. The ALJ faulted the Company for not providing Hagood's explanation in counsel's email. (*See id.*) But this finding of fault was completely unfounded, as counsel explained at the hearing:

> Your Honor, this is running very far off field. Looking at the dates on these and any investigation I would have relative to getting ready for this hearing, I wasn't aware of the facts regarding this do not rehire issue[. A]gain[, f]rom my standpoint, at that time, it wasn't a very big deal at all. But obviously, as a part of investigating this case, I learned a lot more about the facts. And you've heard that through the evidence today. It doesn't change anything. It has no impact at all on this proceeding, given that now you have evidence as to what really happened. And I wasn't aware of that in September, when those emails came into being.

(Tr.483:5-15.)

The Court's decision to discredit Hagood based solely upon counsels' emails is entirely unfounded and inappropriate. A party's attorney does not have the benefit of omniscience. Rather, in preparing for trial, certain pieces of evidence and explanations are often uncovered that were otherwise unknown. That is what happened here. There was absolutely no evidence offered to undercut Hagood's explanation for his action. Likewise, there was absolutely no evidence offered that Hagood had any knowledge of Briggs' past Union affiliation or that he had any ill-will toward the Union. (*See* Tr.473:18-24.)

In a footnote, the ALJ sought to further prop up his finding of animus by pointing to other evidence relating to Hagood. (*See* Decision, 8 n.9.) First, the ALJ suggested that "[a]nother indication of Respondent's discriminatory motive" is that Hagood brought Hawkins to human resources to complain about Briggs but failed to act when Nadine Pugh was allegedly insubordinate to him. (*Id.*) This conclusion is also based on a false premise. Hagood testified, without contradiction, that while he had previously had a disagreement with Pugh, he did not perceive her to be insubordinate. (Tr.478:22-479:17.) And Hagood also testified, without contradiction, that he was unaware of Briggs' past union activity. (Tr.473:18-24.) As a result, there was absolutely no logical way that Hagood could target Briggs on that basis.

Similarly, the ALJ suggested that "Hagood's testimony that Hawkins told him that [Briggs] threw an elbow or elbowed Hawkins, Tr. 474, is an indication of Respondent's animus towards [Briggs] emanating from her union support and prior testimony." (Decision, 8 n.9.) Once again, there is no evidence whatsoever that

Hagood has any history or discriminatory motive relating to the Union. The fact that Hagood recalled Hawkins telling him that Briggs "elbowed" Hawkins and Hawkins later described it as being "bumped" or "pushed" is the kind of semantical discrepancy expected between multiple witnesses. Indeed, Hagood used the terms interchangeably during his own testimony. (*See* Tr.480:1-3 ("If I remember correctly, Ashley [Hawkins] came up to me and said that Lorraine [Briggs] had elbowed or bumped her, whenever she cut between herself and Eugene [Hopson].").) This does not reveal any animus on the part of Hagood or the Company.

Ultimately, the contorted analysis by the ALJ of the "do not rehire" notation displays his results-oriented review of the evidence. The evidence was undisputed that Hagood had written the notation on the termination checklist in a way that was consistent with his past practice from his previous employer.[6] Yet, rather than crediting this honest and unrebutted explanation, the ALJ squinted at the evidence to find discriminatory motivation where none could possibly have existed.

Finally, the conclusion could also be logically made by the Board that this whole pumped-up charge is *de minimis* and not worthy of further consideration. There is no evidence in the record that the do-not-hire notation did or would ever

[6] The ALJ faulted the Company for not introducing other checklists marked "do not rehire" by Hagood, suggesting that, "if they exist, [they] would indicate Hagood was not discriminating against [Briggs]." (Decision, 7 n.8.) However, the Company had no notice that such evidence was necessary to prove its innocence. Hagood's testimony regarding why he wrote the notation stood uncontradicted at the hearing, as did his testimony that he had written "would consider rehire" and "do not rehire" on several documents before being instructed by McNiel not to do so. (Tr.481:14-19.) The General Counsel did not subpoena or seek to introduce any other termination checklists filled out by Hagood. The ALJ's guilty-until-proven-innocent mindset contradicts the presumption of innocence that is foundational to our justice system.

impact Briggs' consideration for future employment with the Company, especially given the facts that she has not re-applied, has expressed no desire to do so, and McNiel testified that he intends to remove the notation from the record in any event because it was not HR authorized. (Tr.448:18-449:1, 371:17-373:4.)

B. Exception 2: The ALJ erred in finding that the Company violated Section 8(a)(1) by allegedly telling Cheryl Muldrew not to discuss her last chance warning with anyone else on January 21, 2016.

The ALJ also concluded that, during their meeting on January 21, 2016, McNiel ordered Muldrew not to discuss her LCA with anyone. (Decision, 8, 12.) To reach that conclusion, the ALJ decided to credit Muldrew over McNiel "given McNeil's [sic] incredible testimony regarding Respondent's use of [Briggs'] May 30, 2013 discipline." (Decision, 8.) The ALJ's analysis cannot withstand scrutiny.

McNiel denied telling Muldrew that she should not discuss her discipline with anyone else. (Tr.318:24-319:2.) He explained his standard practice:

> [W]henever I have any kind of interviews with employees, I let them know that what they're telling me is confidential. That I'm not going to reveal what they're saying unless it's absolutely necessary. Because I need them to be able to trust me that hey, if I go to Eric, I can go to him with my problems and it's going to get fixed and no one's going to be like, oh, well, Shirley is the tattletale and comes to me with everything. So I tell them that. And so it was a confidential situation in that manner, and that's what I meant by that.

(Tr.329:8-23.)

McNiel's account was corroborated by the testimony of at least three disinterested employees who met with McNiel and were called by General Counsel. Gloria Lollis, an employee interviewed by McNiel, testified that McNiel "did not tell me that I wasn't allowed to talk about discipline. No other manager or supervisor

told me that I wasn't allowed to talk about discipline." (Tr.80:3-11.) Lollis testified that "McNiel did not tell me that Muldrew shouldn't have been talking about her discipline. No other manager or supervisor told me that Muldrew shouldn't have been talking about her discipline." (Tr.81:14-23.) Lollis said that McNiel told her that "whatever we say in this office is confidential" (Tr.81:1-3), an instruction which was not surprising to Lollis because she believed that employees are entitled to privacy relative to their own discipline. (Tr.82:17-83:4.) Similarly, Phillips, an individual who has previously filed charges with the Board, testified that when she was interviewed by McNiel relating to the Briggs-Hawkins incident, McNiel did not tell her that she should not talk about it with other employees. (Tr.106:3-10.) Even Briggs testified that no managers or supervisors ever told her that employees were not to talk about their suspensions or discipline. (Tr.190:15-18.)

Inexplicably, the ALJ ignored all of this corroborating evidence. He also overlooked the inconsistency in the LCA itself containing no mention of confidentiality with respect to its terms vis-a-vis the employee while crediting the self-interested oral testimony of Muldrew to the contrary. This was error. The Board ordinarily defers to the credibility findings of an ALJ, particularly where those findings are based on a witness's demeanor. However, "the Board has held consistently that when 'credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.'" *Vic Koenig Chevrolet*, 263 NLRB 646, 646 n.1 (1982) (citation omitted). "When the demeanor factor is diminished, the choice between conflicting testimony rests not only on demeanor, but also on the weight of the evidence, established or

admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Id*; *Jewel Bakery*, 268 NLRB 1326, 1328 (1984) (finding that "judge's failure to explicitly review and give due consideration to all the relevant evidence taints his credibility resolutions").

Here, the overwhelming evidence proved that Company did not tell Muldrew not to discuss her LCA. First, the LCA itself contained no such restriction. Second, three other employees, including Briggs, testified consistently that McNiel gave no such mandate during their investigative meetings. Third, the General Counsel offered no motive for McNiel to require Muldrew to avoid discussing her discipline.

In sum, McNiel's testimony about what he said to Muldrew is the most plausible, as he simply told her what he told other employees: He would keep what she told him confidential. As a result, the ALJ erred by concluding that McNiel issued a mandate to Muldrew against disclosure. The Board should not adopt this baseless finding by the ALJ.

C. Exception 3: The ALJ erroneously concluded that the Company told Cheryl Muldrew that she was being discharged in part for discussing her last chance agreement with other employees in violation of Section 8(a)(1).

The ALJ also determined that McNiel told Muldrew that she was being discharged for discussing her LCA with her coworkers. (Decision, 8, 12.) As above, the ALJ reached this conclusion solely by choosing to believe Muldrew over McNiel.

Again, this was error. The ALJ provided no reason for his decision to ignore the testimony of three other employee witnesses who were called by the General Counsel and who testified that McNiel did not tell them that they were prohibited

from discussing their meeting with other employees. (*Supra* Part II.B.) Moreover, the ALJ stunningly glossed over the fact that the General Counsel did not charge the Company with an unfair labor practice for terminating Muldrew, which logically implies that the General Counsel found no evidence that her discussion of her discipline influenced her termination. Indeed, one can be sure that the General Counsel would have pursued Muldrew's claim that she was discharged for an unlawful motive if it had believed her when she said that was precisely what she was told at the time of her termination.

In short, the weight of the evidence, established facts, inherent probabilities, and reasonable inferences drawn from the record as a whole vindicate the explanation that McNiel provided at the hearing of what he said. Muldrew was not terminated in whole or in part because she discussed her LCA with other employees; nor was she ever told that she was by McNiel. Accordingly, the ALJ erred by concluding that the Company told Muldrew that she was being discharged for discussing her LCA with her coworkers.

D. Exception 4: The ALJ erred by concluding that the Company violated Section 8(a)(1) by maintaining a rule that prohibits employees from making audio recordings anywhere in its Hope facility at any time.

Next, the ALJ determined that the Company violated Section 8(a)(1) through its maintenance of Group A, Rule 12 of the work rules, which prohibited:

> Unauthorized use of still or video cameras, tape recorders, or any other audio or video recording devices on Company premises, in a Company-supplied vehicle, or off-Company premises involving any current or

former employee, without such person's expressed permission while on Company business.

(JX 2 at p.18.)

The ALJ correctly determined that Southern Bakeries "has established a pervasive and compelling interest in its proprietary information" to support the ban on photography. (Decision, 12.) Yet, the ALJ faltered in his conclusion that Southern Bakeries "has not established such a pervasive and compelling interest in prohibiting audio recordings in non-production areas (e.g. break rooms, human resource offices) of the Hope facility." (*Id.*) To the contrary, there is nothing in the rule that restricts an employee's Section 7 rights explicitly or in practice.

In *T-Mobile USA, Inc.*, the Board found that an employer's rule prohibiting recordings could reasonably be understood to affect Section 7 rights and was therefore overbroad because that rule required the involvement of the employer for permission to photograph or record under any circumstance. 363 NLRB No. 171, 2016 WL 1743244, at *4-5 (Apr. 29, 2016). Unlike *T-Mobile*, Southern Bakeries' rule cannot be reasonably construed by employees to have a chilling effect on Section 7 rights. Specifically, it solely promotes and protects employee rights to privacy and is narrowly tailored to protect those rights. Bakery management and supervision is not involved in whether the audio recording can occur. The only consent required is from the present or former employee(s) being recorded and, therefore, the Company cannot possibly interfere (or be perceived as wanting or intending to interfere) with employees' Section 7 activities. Thus, employees' rights to engage in activity

protected under Section 7 are not hindered and instead are arguably facilitated by the clause.

If the recording is of another employee or former employee, the final clause encourages employees to speak with the person(s) they are seeking to record, which may facilitate discussion of potential adverse work conditions, unequal treatment, or organized efforts to mobilize labor. What is more, that clause actually protects picketing employees or employees engaging in protected rights insofar as it prevents employees who are anti-union from recording employees for nefarious purposes who are exercising valid Section 7 rights. What is more likely of legal concern, pro-company employees recording pro-union employees engaged in protected activity and conveying the information to management; or pro-union employees recording pro-company employees participating in pro-management activities and passing this information on to the union? There can be no contest on this question. Rather, a rule giving employees the right to control who records them would more likely be viewed as respecting, not undermining, employee Section 7 rights. There is no chilling effect on an employee's Section 7 rights by the existence or application of this clause.

Therefore, the prohibition against audio recordings in Group A, Rule 12 cannot be reasonably read by an employee as a curtailment of Section 7 rights, and the ALJ erred by concluding otherwise.

E. Exception 5: The ALJ erred by determining that the Company violated Section 8(a)(1) by maintaining a rule that prohibits employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

The ALJ also determined that the following prohibition in Group A, Rule 13 violated Section 8(a)(1):

> Using company time or resources for personal use unrelated to employment with the company without prior authorization. This includes leaving company property during paid breaks or leaving your assigned job or work area without permission.

(JX 2 at p.17)

The ALJ concluded that "this rule is likely to be interpreted as restricting Section 7 rights given Respondent's failure to distinguish between employee rights during working time and break time." (Decision, 12.) However, the ALJ ignores the express language of Group A, Rule 13 and established NLRB precedent in this area.

This rule facilitates Southern Bakeries' continuous production system by requiring employees to remain on the job and work, unless excused, to avoid unproductive downtime and production problems arising from failure to constantly monitor the process. (Tr.290:12-291:8, 292:11-293:7.) Southern Bakeries has a valid business interest in assuring that employees do not use its resources for personal rather than business reasons, including stealing time by engaging in personal business or activities while on-the-clock. (Tr.291:22-25.) This rule also serves a safety purpose in ensuring that Southern Bakeries can account for the whereabouts of all its employees in the event of an emergency situation, such as a fire, requiring evacuation of the facility. (Tr.292:1-10.) As such, Group A, Rule 3 was enacted for legitimate business purposes and is not facially unlawful.

The NLRB has held that a rule containing the same substantive language as this example in Group A, Rule 3 was not in violation of the Act. In *2 Sisters Food Group, Inc.*, 21-CA-38915, et al, 2011 WL 7052272 (NLRB Dec. 29, 2011), the employer was accused of maintaining an unlawful rule prohibiting employees from "[l]eaving a department or the plant during a working shift without a supervisor's permission" and "stopping work before shift ends or taking unauthorized breaks." *Id.* at *3. The Board determined that rules that "prohibit only leaving a department or plant during a shift without permission, stopping work before shift ends, and taking unauthorized breaks" do not violate Section 8(a)(1) of the Act. *Id.* Such rules are not unlawful because they only prevent an employee from taking unauthorized leave or breaks (or leaving the plant during breaks) and do not expressly restrict concerted activity by employees. *Id.*

A similar rule was upheld in *Hitachi Capital America Corp.*, 361 NLRB No. 19 (2014). The rule in that case prohibited: "Leaving the Company or assigned work place (other than breaks or meal periods) without permission from a supervisor or other person authorized to grant permission." *Id.* The Board upheld the rule because it was not unlawful on its face and could not be read to be such without "impermissibly 'reading particular phrases in isolation' or 'assuming improper interference with employee rights.'" *Id.* (quoting *Lutheran Heritage Village*, 343 NLRB 646, 646 (2004).

Southern Bakeries' Group A, Rule 3 contains the same elements as the rules in *2 Sisters* and *Hitachi Capital*. Just like those rules, which were deemed lawful, Group A, Rule 3 prohibits leaving company property or one's assigned work area,

taking unauthorized breaks, or engaging in other personal activity on company time without permission. Group A, Rule 3 does not violate Section 8(a)(1) of the Act because these prohibitions are facially neutral and nothing in the language of this rule expressly restricts or interferes with employee rights under Section 7. *See 2 Sisters*, 2011 WL 7052272, at *3; *Hitachi Capital*, 361 NLRB No. 19. Absent such express language, unlawfulness must not be speculated or presumed and the rule is legitimate. *Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005); *Lutheran Heritage*, 343 NLRB at 646; *Hitachi Capital*, 361 NLRB No. 19.

Thus, only a severely strained analysis of Group A, Rule 3 without regard to the practicalities of the workplace can find the policy to be even remotely at odds with the Act. The Decision should be overruled on this issue.

III. Conclusion

The NLRB does not sit as an executive human resource department, being free to second-guess every company decision with which it disagrees. Rather, unfair labor practices must be proved by affirmative evidence, not by speculation. *Virginia Electric Power Co.*, 264 NLRB 345, 347 (1982). Here, the record failed to sustain the ALJ's findings that the Company acted unlawfully in any way.

Instead, the record shows only that: the Company had and was motivated solely by legitimate business justification in disciplining and discharging Briggs; that the "do not rehire" notation on an internal Company document was not unlawful or material; there is no evidence that the Company promulgated or utilized a rule that prohibited Muldrew from discussing her company discipline; and

the two rules the Board challenges are entirely legitimate, consistent with business necessity, and non-discriminatory in intent, impact, and application. The ALJ erred in his conclusions otherwise, as his illogical and unsupported analysis displays an effort to reach a predetermined result rather than to rule on the evidence before him.

Accordingly Respondent Southern Bakeries, LLC respectfully requests that the unfair labor practices found by the ALJ be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Respondent Southern Bakeries' Brief in Support of Its Exceptions to the Administrative Law Judge Decision" has been served upon the following parties, by email, this 24th day of July 2017:

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I hereby certify that a copy of the foregoing "Respondent Southern Bakeries' Exceptions to the Administrative Law Judge Decision" has been served upon the following, UPS overnight delivery, this 24th day of July 2017:

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